Response of Amberhawk Training Limited to the MoJ Consultation on "*Human Rights Act Reform: A modern Bill Of Rights*"

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Introduction

1. This *Response*" to the MoJ Consultation on *Human Rights Act Reform* (the "*Consultation*") is from Amberhawk Training Limited. It is limited to the proposed changes to Article 8 (HRA) which impact on the UK_GDPR/DPA2018. To a lesser extent, the Response also looks at the proposals that impact on the Special Purposes & FOI regimes including an element of Article 10 HRA. Details of the author and Company are at the end of this Response (page 12).

2. Amberhawk also manages a specialist data protection/human rights/FOI blog (***Hawktalk***); this Response is based on a summary of the content of three blogs that relate to the Consultation. A reference to the blogs is provided at the end of this Response in case further analysis is needed.

3. The major problems with the Consultation can be summarised as follows:

   - An absence of any consideration or analysis of the impact of the human rights proposals on the current UK data protection regime or how the changes impact on the protection afforded to data subjects (60 million in the UK alone).
   - An absence of any consideration or analysis of the impact on these proposals for changing the UK Data Protection Regime as proposed by the DCMS in a separate consultation "*Data: a new direction*".
   - An absence of any consideration or analysis of the impact of these proposals on the Adequacy Agreement agreed with the European Commission for the transfer of personal data between the UK and EU Member States, resulting in the likely cessation of that Agreement and damage to the UK's economy.
   - The lack of evidence to justify the rebalancing of Article 8 and Article 10 (private and family life versus freedom of expression and to impart information) in favour of Article 10 as proposed in the Consultation.
   - An absence of any consideration or analysis of the impact of these proposals on the provisions that relate to the Special Purposes defined in the DPA2018.
   - An absence of any consideration or analysis of the impact of these proposals on the FOI/FOISA or EIR/EIRSA regimes (e.g. the data protection/FOI interface).
   - Misrepresentation of case law that relates to the processing of personal data mentioned in the Consultation (e.g. *ML v Slovakia; Ellis v Essex Police*) and

omission of relevant case law (e.g. *Stanley et al v Met. Police and L.B. Brent; Marper v UK).*

- The lack of Parliamentary processes to ensure changes to the human rights of UK citizens are subject to detailed scrutiny. The proposals include the use of secondary legislation (i.e. via Ministerial powers) to deliver changes to individual human rights with minimal involvement of Parliamentary scrutiny.
- The lack of a reference to the proposed changes arising from the *Judicial Review and Courts Bill* that intend to restrict Judicial Review and certain decisions of the Upper Tribunal. Given that with respect to A.8 and data protection, Judicial Review is a major safeguard for data subjects (examples are in facial recognition CCTV used by South Wales Police and the immigration exemption on; see footnote 4, page 4), the hurdles imposed by this Bill adds to the removal of important protection from data subjects by the Consultation.

4. It has to be stated at the outset, that given the list of omissions above, one wonders about the quality of the intellectual basis for the proposed changes which are being imposed on the data protection regime. Indeed, one wonders how these omissions have been made (e.g. by ignorance? Deliberate omission?).

5. In any event, the fact remains that there is an absence of any consideration of data protection matters in the Consultation; this has undermined the both the MoJ and DCMS consultations mentioned above (paras 2 and 3). The lack of awareness exhibited by these consultations is a testament to the Government's fragmented approach to information rights in general. For instance:

   - data protection, GDPR and private sector security of personal data is a DCMS responsibility but effectively devolved to the Home Office for law enforcement and national security;
   - public sector security of personal data is a Cabinet Office responsibility (as is Freedom of Information (FOI) and the interface between DPA2018 and FOIA, FOISA, EIR, EIRSA); and
   - responsibility for A.8 and A.10 ECHR remains at the MoJ.[1]

[1] *I understand that Mr. Gove was the driving force behind this fragmentation decision, following a FOI request to his private email address which was being used for official business. Mr. Gove's Department strongly resisted the FOI request and when it was lost, the Minister when he became Lord Chancellor, created the current fragmentation of the information rights regime for reasons best known to himself.* https://www.theguardian.com/politics/2011/sep/21/michael-gove-emails-freedom-information

Secondary legislation should be excluded

6. Many changes proposed by the Consultation that impact on data protection can take effect through secondary legislation approved by Parliament by an affirmative route (page 100 of the Consultation).

7. Given that data sharing arrangements (e.g. in the Digital Economy Act 2017) are enacted by such secondary legislation, there is considerable risk that ill thought-out proposals (e.g. for data sharing between many public bodies) can be enacted without detailed scrutiny by Parliament or public debate.

8. Although, in theory, secondary legislation can be voted down in Parliament, it is not. A House of Commons Research Paper on Statutory Instrument explains that:

> *"In the House of Commons, the last time a draft Statutory Instrument subject to affirmative procedure was not approved was in July 1978 when the draft Dock Labour Scheme 1978 was defeated by 301 votes to 291[2].*

9. In summary, the fact that secondary legislation is usually nodded through unchecked means that the affirmative resolution procedure effectively equates "*what is **necessary**"* with "*what the Government of the day specifies as **necessary**";* "*what is **in the public interest**"* is equated with ***"the interests of the Government of the day"***. Such an equation could be expected in the Russian Duma but not in the Westminster Parliament.

10. The Executive Summary claims that these changes "***preserve Parliament's democratic prerogatives***" (page 5 of the Consultation). With reference to procedures relating to enacting change in human rights via secondary legislation, this phrase is a euphemism that fits comfortably into the current Russian political system of government.

11. In general, data subjects will find it difficult to look to the UK_GDPR/DPA2018 for protection of their personal data (e.g. from a Minister who enacts some wild notion by using powers to legitimise secondary use or disclosure of personal data by Statutory Instrument).

12. The prospect of use of Ministerial powers to modify any human right, granted in ***any*** existing and future legislation is both alarming and unacceptable.

[2] House of Commons Research Paper on Statutory Instruments: https://researchbriefings.files.parliament.uk/documents/SN06509/SN06509.pdf

SUMMARY OF THE KEY DATA PROTECTION OMISSIONS

13. The Consultation does not take into account that the proposed changes as applied to A.8 ECHR have a knock on effect to the data protection regime in the UK; this arises from the OPTIONS 1 and 2 proposals (page 100 of the Consultation).

14. For example, the changes associated with the word "***necessary"*** has wide effect. The word is used in UK_GDPR: three Principles in A.5; most lawful bases in A.6; most conditions for the processing of special category of personal data and criminal offence personal data (A.9, A.10 and Schedule 1 of the DPA2018) and several A.23(1) exemptions. Similarly, with "***in the public interest***" is used to fashion exemptions (A.23(1)), in Schedule 1 of the DPA2018 and scattered throughout the UK_GDPR.

15. It can be seen that if "***great weight*** has to be given to Parliament's view of processing that is "***necessary"*** or ***"in the public interest"***, then any enforcement action by the ICO or by a Compliance Order sought by the data subject (S.167 of the DPA2018) becomes far more difficult. And if the data protection regime cannot be properly enforced, it follows that the protection for data subjects is considerably weakened.

16. The Consultation's proposals, in effect create a new defence for controllers that, for example, a public authority **is** acting ***in the public interest*** or the processing **is** ***necessary*** as these two propositions carry "***great weight***". For instance, Southampton City Council stated it was necessary in the public interest that every cab should have video/audio recordings of all its passengers as part of the licence condition (i.e. each cab journey would have video/audio recording taken). The ICO successfully enforced on the grounds that the processing in every case was not necessary nor in the public interest. That enforcement could easily fail if "***great weight***" had to be given to the "public interest" or what processing was "***necessary".***[3]

17. In addition, it will become more difficult for a data subject to challenge a controller for unlawful processing if the processing is deemed by Parliament to be "***necessary***" or "***in the public interest***". For example, the immigration exemption in Schedule 2, Paragraph 4 of the DPA2018[4] is a "***public interest***" exemption in relation to all data subject rights that the Court of Appeal found unlawful. Surprisingly, this "*public interest*" was absent in the DPA1998 or DPA1984 which did not contain an immigration exemption. Whether the Court would have determined that the exemption was

[3] The Southampton case **EA/2012/0171 (Information Rights Tribunal)**

[4] The Immigration exemption judgement: https://www.bailii.org/ew/cases/EWCA/Civ/2021/800.html. Note that this legal Action was taken via Judicial Review which is now threatened – see para 4 of this submission

unlawful, if "***great weight***" had to be given to Parliament's view of what was "***in the public interest***", is a moot point.

18. Many of the exemptions in Schedules 2 to 4 of the DPA2018 become potentially far more expansive to the detriment of data subjects if "***great weight***" has to be given to Parliament's view that the exemption is ***necessary*** or ***in the public interest***.

19. If such processing is facilitated by Parliament by Statutory Instrument, the situation becomes far worse for data subjects. For example, the *Data Protection Act 2018 (Amendment of Schedule 2 Exemptions) Regulations 2022* were debated for 15 minutes in Committee; no amendments were made or votes taken. Now the immigration exemption is deemed lawful until the next legal challenge (which is unlikely thanks to these ***great weight*** changes and the *Judicial Review and Courts Bill).*

20. Whatever option is chosen (***public interest*** or ***necessary***) there will also be an impact on the interface between DPA2018 and the FOI/EIR regimes (or FOISA/EIRS regimes) to the general detriment of applicants under the FOI Act[5]. The impact on the FOI regimes has not been considered by the Consultation.

21. The Consultation states that greater emphasis on the A.10 right of freedom of expression and to impart information over the A.8 right of privacy. Para 213 states that the "*courts should* ***only grant relief [****for A.8 to prevail****] … where there are exceptional reasons".*** In making this statement, the Consultation ***ignores*** the impact of this proposal on the parts of the UK_GDPR relevant to the A.8/A.10 balance (e.g. the A.17(3)(a) exemption from the right of erasure; the journalists code of practice being prepared by the ICO; the Special Purpose enforcement and the exemption in Schedule 2, Part 5 of the DPA2018).

Further impact in the DCMS Consultation

22. The Consultation ***fails*** to consider the DCMS Consultation made additionally proposals with respect to the processing of personal data that is either ***necessary*** or ***in the public interest***. For example, with respect to ***necessary*** processing, the DCMS is likely to specify the following changes to the UK_GDPR regime:

    - a limited, exhaustive list of processing which is "***necessary***" in the legitimate interests of the controller (e.g. debt tracing);

[5] There are several exemptions in the FOI regime that are subject to a "public interest test" which may be skewed by the Human Rights proposals in favour of more secrecy.

- that the processing of special category of personal data would be "***necessary***" for AI when checking for bias etc or for detecting technical faults, and enhancing functionality on websites.
- that any processing that is incompatible with the purpose of the obtaining which would be defined as being "***necessary***"

23. With respect to "***in the public interest***", the Consultation ***fails*** to consider that the DCMS consultation proposes to change the UK_GDPR:

- To enhance public confidence in data sharing ***in the public interest*** (includes law enforcement and national security).
- To make certain university research projects to be ***in the public interest***
- So that further processing for an incompatible purpose may be permitted when it safeguards an ***important public interest***.
- So that the sharing of personal data for different purposes can occurs when there is ***a public interest or economic value*** in doing so.
- To ensure effective collaboration between the public and private sector in …relation to other matters of ***public interest*** (e.g. COVID)
- To define 'substantial public interest' or listing of specific situations that are deemed to always be in the ***substantial public interest*** (Sched 1; DPA2018)

Freedom of expression emphasis is justified by a complete misrepresentation of ECHR case law (ML v Slovakia)

24. The Consultation ***fails*** to give one example of a case (from the hundreds to choose from[6]), of where the Government think freedom of expression should take precedence over the A.8 privacy right. The assumption that the public interest should be in favour publication over privacy, infers that there are cases where the Government think the Courts got the balance wrong. However, no UK case is provided as a reference point. So the question is: "*where is the evidence for change*?".

25. The Consultation argues that the freedom of expression and to impart information to the public should prevail in many circumstances. This is spelt out by the Consultation in the following terms:

[6] Cases involving A.8 versus A.10 – see Informm's list on https://inforrm.org/table-of-cases-2/

> *"..the Bill of Rights legislation should contain a stronger and more effective provision, making it clear that the right to freedom of expression is of the utmost importance, and that courts should* ***only grant relief impinging on it where there are exceptional reasons".*** *(para 213; my emphasis)*

26. Instead the Consultation justifies the need for change by citing the ECHR judgement in ***ML v Slovakia***[7] (see from para 31 below) as follows:

> *"But at the same time, the case law of the Strasbourg Court has shown a willingness to give priority to personal privacy, including in a recent judgment finding that media reporting about a deceased priest's convictions for child sexual abuse and public indecency could interfere with his mother's right to private life, drawing, in part, on the so-called* ***'right to be forgotten'*** *invented by the Court of Justice of the European Union" (para 206 of Consultation)*

27. I suspect the authors of the Consultation have ***not*** read the judgement. For instance, judicial commentary like: *the journalists concentrated "on sensational and, at times, lurid news, intended to titillate and entertain"* does not help the case made in the Consultation for more protection of freedom of expression.

28. I also suspect the reference to the "*so-called right to be forgotten*" in para 26 above has been included for pejorative effect. The Consultation ***omits*** the fact that this right was not "***invented***" as it exists in the UK_GDPR as an exemption from the right to erasure on the grounds that the freedom to impart information to the public should prevail (see A.17(3)(a) of the UK_GDPR).

29. Finally, the authors of the Consultation ***failed*** to realise that the priest is deceased; and the "*so called right to be* forgotten" does not apply and is completely irrelevant.

ML v Slovakia is a case of unethical journalism (if one reads the judgment)

30. The press stories under scrutiny in ***ML v Slovakia*** relate to a Roman Catholic priest who had been cautioned / convicted in relation to sexual abuse and disorderly conduct (consensual oral sex in a public place). All criminal convictions / cautions had become spent and the priest died in 2006, possibly by suicide.

31. In 2008, three tabloid newspapers published articles about the priest's conviction for sexual abuse and a possible link to his supposed suicide. The articles were headlined: "*Priest confessed to abuse of minor boys. Secret of priest's suicide", "Priest abused*

[7] ML v Slovakia [2021] ECHR 821 https://www.bailii.org/eu/cases/ECHR/2021/821.html

Roma boys. He confessed before his suicide", and *"Protected priests. The Church provided a guarantee to get a paedophile priest out of prison*".

32. The articles asserted that the priest had confessed to the Bishop and the Church then offered a the authorities a guarantee of future good behaviour; that explained how the priest avoided prison. Suicide was reported as a fact. Given recent history of the Church on this subject, there appears to be a strong public interest in this story.

33. However, as far as the journalists were concerned, their freedom of expression arguments went pear shaped because they could not present any evidence backing up their stories. For example, the Bishop said he wasn't contacted by the press about the case, evidence of police contacts were lost, and internet allegations about the priest (e.g. suicide) were reported in newspaper stories as facts.

34. To give a flavour of these issues, the *ML v Slovakia* judgement notes:

> "*The journalist M.K. referred to a very good source who had provided him with a written document, and to a police record concerning the questioning of the applicant's son; he claimed to have verified the authenticity of the written document but did not remember any details. M.K. asserted that he had also contacted police spokespersons and had sent an email to the bishop's office, but he was not sure whether he had saved their exchange".(para 10 of judgement).*

35. Five quotes from the judgement about the journalistic standards the ECHR encountered need no further embellishment except to emphasise some key points:

i. "*Although the journalists must be afforded some degree of exaggeration or even provocation, the Court considers that the frivolous and unverified statements about the applicant's son's private life* ***must be taken to have gone beyond the limits of responsible journalism****" (para 47).*

ii. *"... the Court is ready to accept that* ***the distorted facts*** ***and the expressions*** *used [by the press] must have been upsetting for the applicant and that they were of such a nature as to be capable of considerably and directly affecting her feelings as a mother of a deceased son*". (*para 48*)

iii. "*…the Court reiterates that there is a distinction to be drawn between reporting facts - even if controversial - capable of contributing to a debate of general public interest in a democratic society, and* ***making tawdry allegations about an individual's private life".****. (para 53*)

iv. [with respect to the public interest] *"….the pre-eminent role of the press in a democracy and its duty to act as a "public watchdog" are important considerations in favour of a narrow construction of any limitations on freedom of expression. However,* ***different considerations apply to press reports concentrating on sensational and, at times, lurid news, intended to titillate and entertain****, which are aimed at satisfying the curiosity of a particular readership regarding aspects of a person's strictly private life". (para 53)*

v. *"…the Court finds that, as well as being rather provocative and sensationalist, the articles in question* ***could hardly be considered as having made a contribution to a debate of general interest****".(para 54*)

36. So does ***ML v Slovkia*** represent the kind of journalism the Consultation wants to promote and protect?". I doubt it, but with Dominic Raab in charge, one never knows.

Misrepresentation of UK case law (*Ellis*)

37. The Consultation claims that the police are restricted in relation to the wider use of personal data and quotes in support of this the case of *R (Ellis) v the Chief Constable of Essex Police (*para 137 of the Consultation*)* which was heard almost 20 years ago. As with *ML v Slovakia*, the Consultation misleads so much, that once again, one suspects the authors of the Consultation ***failed*** to read the *Ellis* judgment.

38. At the heart of *Ellis* is a simple question? Should the police be able to deter crimes by printing posters or leaflets that identify known criminals who have been arrested or put behind bars? The Consultation explains that the *Ellis* case:

> *"…has led to the situation where police forces face a real risk of legal challenge, where they wish to publicise the results of criminal activity or deter others by issuing posters identifying offenders who have been convicted for very serious crimes" (para 137).*

39. The Consultation ***fails*** to explain that in *Ellis,* the Probation Service (and others) provided the following explanation to the Court:

> *"If Gary Ellis were to be made subject to the Essex police naming scheme, this is likely to make worse the risk of homelessness, drug misuse, reoffending, non-compliance on licence and is likely to increase the risk of harm to the public. If named there is also the distinct possibility of some collateral harm to the parents of Gary Ellis, his ex-partner and his daughter." (para 10-12 of the Ellis judgement).*

40. The Consultation ***fails*** to mention an A.8 case, involving the *London Borough of Brent*[8], where the *Ellis* arguments resurfaced. It relates to the distribution of a leaflet that identified youths who were excluded from a geographic area (e.g. a shopping centre). The youths were subject to an Anti-Social Behaviour Order (ASBO) which specifically excluded named individuals from that area and the police wanted to enforce the ASBO by distributing a leaflet that identified those who were subject to the ASBO.

41. So should the leaflet be circulated by the police? In this case, the A.8 argument used in *Ellis* was rejected by the Judge in the following terms:

> *"It is clear to me that whether* publicity *is intended to inform, to reassure, to assist in enforcing the existing orders by policing, to inhibit the behaviour of those against whom the orders have been made, or to deter others,* ***it is unlikely to be effective unless it includes photographs, names and at least partial addresses.*****"** (para 40 of the judgment; my emphasis)

42. It is interesting to note that the Judge concluded that "*Article 8 could be involved if the publicity was found to be unnecessary* or *disproportionate*". This provides the criteria that resolves the problem raised by the Consultation in *Ellis*. If the publication of personal data is *necessary and proportionate* then there is no A.8 breach, if publication is *unnecessary or disproportionate* there is an A.8 breach.

43. In my view, all that is required is a proper assessment of ***necessity*** and ***proportionality***; not a change in the law. Hence the arguments presented by the Consultation in support of the changes to the A.8 regime do not stand up to scrutiny.

EU-UK Adequacy Agreement down the tubes?

44. The Consultation ***fails*** to mention the risk to the UK economy that depends on the free flow of personal data from the European Union. How could this be missed?

45. The UK has an Adequacy Agreement[9] with the European Commission to safeguard the transfers of personal data between EU Member States and the UK. The proposed changes put that Agreement at risk. The Agreement was made because the European Commission understood that:

- there was "… *United Kingdom's adherence to the ECHR … as well as its* ***submission*** *to the jurisdiction of the European Court of Human Rights*". (para 19;

[8] *Stanley et al v Met. Police and L.B. Brent [2004]*

[9] Link to the UK Adequacy Agreement documents at the end of: file:///C:/Users/chris/AppData/Local/Temp/Data_protection__Commission_adopts_adequacy_decisions_for_the_UK.pdf

my emphasis). ***Comment***: as explained at para 46 below, the UK is no longer "***submitting***" to the jurisdiction of the European Court. The Consultation states: "*…that the judgments and decisions of the European Court of Human Rights …* ***are not part of the law of any part of the United Kingdom****" (page 100 of MoJ)*

- "*….any person that considers that his or her rights, including rights to privacy and data protection, have been violated by public authorities, can obtain redress before the UK courts under the Human Rights Act 1998*". ***Comment***: the Consultation proposals put considerable hurdles in the way of any person seeking such redress (e.g. to show prior "significant disadvantage" etc; para 109 and in the *Judicial Review and Courts Bill* (see last bullet of para 3 above).

- there was "*continued adherence to such instruments*" (i.e. "*submission to the jurisdiction of the European Court of Human Rights";* para 120). ". ***Comment:*** "*continued adherence*" is no longer the case

46. The Government's intent is for ECHR judgments and decisions:
    - "(a) are not part of the law of any part of the UK, and
    - (b) cannot affect the right of Parliament to legislate or otherwise affect the constitutional principle of Parliamentary sovereignty." (page 101; Consultation).
47. It can be seen that the Consultation's proposals on page 101 signals that the UK intends to resile from another International Agreement made with the European Union, in this example commitments made in the Adequacy Agreement.

Concluding comments

48. In summary, the Consultation if enacted is likely to result in weaker protection for data subjects whenever a controller's processing is "***necessary***" or "***in the public interest***"; this can extend to private sector controllers via A.6, A.9 and A.5 Principles.
49. The fact that the DCMS Consultation ***did not discuss*** the impact of its proposed changes on the Adequacy Agreement (e.g. lack of an independent regulator) ***nor*** on the relationship between data protection and human rights is astonishing.
50. The fact that this MoJ Consultation ***did not discuss*** the knock-on effect of the proposed human rights changes on data protection enforcement (e.g. via processing that is "***necessary***" or "***in the public interest***") is also astonishing.
51. The Adequacy Agreement is likely to be revoked. It is astonishing that this important subject with significant impact on the economy is deemed unworthy of mention in the Consultation.

References

The Hawktalk blogs referred to in paragraph 2:

- 18 Jan 2022: UK's human rights proposals significantly weaken protection for all data subjects https://amberhawk.typepad.com/amberhawk/2022/01/uks-human-rights-proposals-significantly-weaken-protection-for-all-data-subjects.html
- 26 Jan 2022: Human Rights proposals undermine Data Protection and Adequacy https://amberhawk.typepad.com/amberhawk/2022/01/human-rights-proposals-undermine-data-protection-and-adequacy.html
- 28 Feb 2022: Proposals to strengthen journalists' freedom to report is based on a fundamental misreading of ECHR judgment https://amberhawk.typepad.com/amberhawk/2022/02/proposals-to-strengthen-journalists-freedom-to-report-is-based-on-a-fundamental-misreading-of-echr-j.html

About Amberhawk

Amberhawk Training Limited is a company founded in 2008 as the vehicle for the continuation of the information law training business previously operated by Pinsent Masons LLP. From 1st September 2008 its main business is designing and delivering information law training – in data protection, freedom of information, information security, human rights, the Regulation of Investigatory Powers Act, marketing rules and related areas of law.

The owners of Amberhawk worked for international law firm Pinsent Masons for nine years and seven years respectively as specialists in information law and members of the top-rated team led by Rosemary Jay, and the late Shelagh Gaskill.

About Dr C N M Pounder

Dr. Chris Pounder is been a Director in Amberhawk Training Limited since the company was founded in 2008. His career in data protection dates back to 1978 and is well documented (e.g. on Google). As well as writing the Hawktalk blog, he has spoken at numerous conferences on data protection and related matters.

During the Blair Government, he gave oral and written evidence before various Parliamentary Select Committees where issues of privacy, data protection and security have arisen (e.g. ID Cards, Surveillance, Computer Misuse Act, data retention policies, national security agencies).

Prior to Amberhawk, Chris joined Masons Solicitors in July 1999 as part of its growing Data Protection and Privacy Team; Masons merged with Pinsents to form PinsentMasons in 2006. Prior to that, Chris held the Data Protection Officer post at Cap Gemini and the Greater London Council where he advised MPs on the Data Protection Act 1984. Chris's Ph. D. is in computational quantum chemistry.